STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IAN CHARLES MORRIS,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 176347
Oakland Circuit Court
LC No. 93-128864 FH

Before: Gribbs, P.J., Sawyer and Young, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to two to ten years' imprisonment. He appeals as of right. We remand this matter to the trial court for further proceedings.

On August 11, 1992, defendant and his friends attended a rock concert at Pine Knob Music Theater. An altercation ensued between the victim, Ronald Lunn, and defendant and his friends. Pine Knob security broke up the fight, escorted Lunn out of the park, and shortly thereafter escorted defendant and his friends out of the park via an opposite exit. Defendant and his friends came upon Lunn in the parking lot. Defendant struck Lunn, knocking him to the ground. Defendant and his friends then began kicking Lunn repeatedly, and ran after being spotted by Pine Knob security. Defendant was eventually apprehended, and Lunn was taken to the hospital. There, he underwent surgery to remove a life-threatening blood clot on his brain, which left him disabled.

Defendant first argues that he was denied due process of law because the circuit court failed to arraign defendant on the information. We disagree. The record indicates that an arraignment hearing was held in circuit court, where defense counsel entered a plea of not guilty and waived a formal reading of the information. However, the circuit court did not accept defendant's plea and waiver due to defense counsel's admitted failure to produce defendant at the hearing. We conclude that any failure to formally arraign defendant at a later date was harmless error. See *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). We find defendant's argument to be nothing more than form over substance where the record indicates that defendant was aware of the felony information brought against

him and defended accordingly. See *People v Weathersby*, 204 Mich App 98, 100-103; 514 NW2d 493 (1994). Therefore, any error was harmless beyond a reasonable doubt. *Minor*, *supra* at 685.

Defendant next argues that the trial court erred in denying his motion to suppress his statement made to the police on the night of the incident. Defendant contends that the statement was involuntary because he did not validly waive his *Miranda*[1] rights and because he was intoxicated at the time. We disagree.

The voluntariness of a defendant's statement is a question for the trial court to determine by viewing the totality of the circumstances. *People v Godboldo*, 158 Mich App 603, 606; 405 NW2d 114 (1986). When reviewing a trial court's determination of voluntariness, this Court examines the record and makes an independent determination. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). However, we give deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994).

First, we briefly address defendant's claim that he did not validly waive his *Miranda* rights. "To establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). Defendant denied that the arresting officer advised him of his *Miranda* rights. However, the arresting officer testified that he did advise defendant of his *Miranda* rights and that defendant waived his rights and agreed to talk to him. The trial judge was in the best position to assess the credibility of the witnesses. *Id*. at 30.

The remaining question, then, is whether defendant's alleged intoxication rendered his statement involuntary. A defendant's intoxication from alcohol is not dispositive of the voluntariness issue. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). In this case, several witnesses testified that defendant did not appear intoxicated at the time that he made the statements at issue. In addition, the record indicates that defendant was not threatened or abused into making the statements. Therefore, in light of the totality of the circumstances, we conclude that the trial court did not clearly err in denying defendant's motion to suppress. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *Marshall*, *supra* at 587.

Defendant next contends that the trial court abused its discretion in admitting the testimony of one of the prosecution witnesses, the victim's mother, without giving defendant the opportunity to make an "offer of proof" concerning its relevancy. However, defendant did not object on the record to the admission of the testimony on this or any other ground. When the prosecution called the victim's mother to the stand, the following colloquy took place:

> *[DEFENSE COUNSEL]*: Your Honor, People call Mrs. Patricia Lund [sic] to the stand.
>
> *[PROSECUTOR]*: Your Honor, before we do may we approach again?

(Conference at bench 15:30:40 on the tape)

[DEFENSE COUNSEL]: All right, Your Honor the record should reflect that I have made an offer of proof vis-a-vis the testimony of Mrs. Lund [sic].

THE COURT: Fine.

We cannot ascertain from this exchange the nature of defendant's purported "objection." Accordingly, we decline to address this issue. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).

Defendant next argues that the trial court erred when it sent a written version of its previous instructions to the jury, upon its request, without consulting defense counsel. We agree. MCR 6.414(A) prohibits ex parte communications with a deliberating jury. *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990). MCR 6.414(A) provides, in relevant part:

> The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

It is undisputed that the trial court in this case provided the deliberating jury with some form of supplemental instruction on the law, a substantive communication, while defense counsel was not present. *France*, *supra* at 142-144.[2] Consequently, it carries a presumption of prejudice in favor of defendant. *Id.* The Supreme Court in *France*, *supra*, noted that the prosecution could nevertheless rebut that presumption by a "firm and definite showing of an absence of prejudice." *Id*. at 163. The Court explained:

> The prosecution may rebut the presumption of prejudice with a showing that the instruction was merely a recitation of an instruction originally given without objection, and that it was placed on the record. In addition, the presumption of prejudice would be overcome with a showing that the trial court had expressed its intent to communicate with the jury and counsel had given prior consent to the communication, as well as to the substance of the instruction. [*Id*. at 163, n 34. (Citations omitted.)]

The Court defined prejudice broadly as "'any reasonable possibility of prejudice.'" *Id*. at 162-163, quoting *United States v Reynolds*, 489 F2d 4, 8 (CA 6, 1973).

The prosecution, citing MCR 6.414(G), argues that no error occurred because the trial court was authorized to provide the jury with a full set of written instructions. However, MCR 6.414(G) contains an additional requirement that was not met in this case: "the court must ensure that such instructions are made a part of the record." As a result, we have no way of determining whether the prosecution can rebut the presumption of prejudice. Moreover, the prosecution's argument does not address defendant's allegation that his attorney was not present at the time the requested instructions were given.

We note that the state of the record on this issue is limited. Further, the record indicates that defendant fully served his two-year minimum sentence. Therefore, we are remanding this matter for further proceedings. Assuming the issue is not already moot, the trial court should hold a hearing regarding whether the prosecution can adequately rebut the presumption of prejudice caused by the trial court's ex parte communication with the deliberating jury. *France, supra* at 163.

In a somewhat related claim, defendant argues that the trial court erred in denying his motion for disqualification prior to sentencing. We disagree. While the factual findings underlying a ruling on a motion for disqualification are reviewed for an abuse of discretion, we review de novo the application of the facts to the relevant law. *Cain v Dep't of Corrections*, 451 Mich 470, 503, n 38; 548 NW2d 210 (1996). "[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Id.* at 497. Having reviewed the record, we conclude that defendant has failed to meet this burden. The trial court did not err in denying defendant's motion for disqualification.

In his last argument on appeal, defendant raises several sentencing issues. However, as stated previously, the record suggests that defendant has already served his minimum sentence. Consequently, these issues may also be moot. In any event, we have reviewed defendant's arguments concerning his sentencing, and find them to be without merit.

Remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] We note that defendant's claim of error is factually supported by the trial court's remarks at the hearing on defendant's presentencing motion for disqualification:

> *[DEFENSE COUNSEL]*: I think most of the sentence is and what is astonishing to me is the communication with the jury regarding written instructions wherein I was never notified that there had been such a message from the jury to you, I will never know whether or not the written instructions given to them were the same instructions that you articulated to them on the record and I don't think that – it is implausible to believe there could have been other pieces of paper included, there could have been other instructions.
>
> *THE COURT*: Are you familiar with the [c]ourt [r]ules?
>
> *[DEFENSE COUNSEL]*: Of course.
>
> *THE COURT*: What does the [c]ourt [r]ule say about that.

[DEFENSE COUNSEL]: About jury instructions.

THE COURT: Yes, about giving them to the jurors.

[DEFENSE COUNSEL]: Yes.

THE COURT: What does it say.

[DEFENSE COUNSEL]: They may have them if they request them; however, any m[e]ssage passed to the Court has to be told to both attorneys, that is also a rule, and I received, the only message received by me was that the jurors did not wish to retire for the evening but rather wanted to remain until they had reached a verdict, that is the only notification that I received . . . .